

MINGO OIL PRODUCERS

IBLA 85-646

Decided December 8, 1986

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, affirming findings of noncompliance and imposition of assessments for failure to comply with regulations governing seals on oil storage tank valves. W-155092.

Affirmed in part, vacated in part.

1. Bureau of Land Management--Oil and Gas Leases: Civil Assessments and Penalties

The BLM may properly cite an oil and gas lessee for an INC with regulatory requirements upon a showing of a failure to effectively seal a valve as required by 43 CFR 3162.7-4(b)(1).

2. Oil and Gas Leases: Civil Assessments and Penalties-- Regulations: Generally

An assessment for failure to effectively seal a valve levied pursuant to 43 CFR 3163.3(j) may be vacated by this Board in view of the suspension of that regulation and the change in Department policy that such assessments should be levied automatically.

APPEARANCES: H. Byron Mock, Esq., Salt Lake City, Utah, for appellant; Lowell Madsen, Esq., U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Mingo Oil Producers (Mingo) appeals from a technical and procedural review (TPR) decision of the Wyoming State Office, Bureau of Land Management (BLM), dated April 11, 1985. The TPR decision affirmed the imposition of two notices of incidents of noncompliance (INC's) and concomitant assessments for noncompliance. Mingo paid the assessments under protest and filed this appeal.

On February 19, 1985, BLM inspected appellant's Classic Federal Well 30-1 on lease W-155092 in sec. 30, T. 20 N., R. 83 W., sixth principal meridian, Carbon County, Wyoming. BLM issued an INC which stated:

"At the tank battery the Equilizer [sic] valve and the fill line valves are unable to be sealed. These valves must be able to be sealed when necessary. An assessment of \$500 is being levied. (Bill Attached). Authority 43 CFR 3163.3(j)." 1/

The INC allowed 5 days from receipt of notice for corrective action, under threat of an additional assessment under 43 CFR 3163.3(a). According to a further notation on the INC, the violation was abated on February 21, 1985. However, a second BLM representative conducted a reinspection on March 11, 1985, and issued a second INC, with the notation "Failure to comply with a written order of the Authorized Office to correct incident of noncompliance within time specified INC Dated 2-19-85 (Equilizer [sic] Line unable to be sealed when necessary) CFR 43 3163.3(J). This Violation Incurs An Automatic Assessment of \$250.00 Under 43 CFR 3163.3(A)." (Emphasis in original.) This second INC also noted civil penalties would be implemented as necessary under 43 CFR 3163.4.

Appellant paid the assessments and submitted a letter protesting the issuance of the INC's. BLM interpreted this protest as being a request for technical and procedural review, and issued a technical and procedural review decision on April 11, 1985. The BLM decision quoted objections found in appellant's protest and addressed them as follows:

Protest: "After the first Notice of Noncompliance was issued by Mr. Darrell Self on 2/19/85 (sic), our foreman on the field, William Davis, had the equilizer [sic] valve and the fill line valves fixed and able to be sealed within a 48 hour time period. We were still fined the \$500.00. On 3/8/85 (sic) in a conversation with Larry Claypool, from your Rawlins office, he indicated new regulations went into effect in the fall of 1984 that entailed just such a problem. On 3/11/85 (sic), Robert Oldson went out to the field to inspect the work done and found it unsatisfactory and levied another \$250.00 fine, even though we did comply with the written order and in the time period specified."

Comment: The assessment for noncompliance being applied for each ineffective seal or for each valve that is incapable of being sealed for the sales phase (if appropriate) is in accordance with our regulations and procedures. In this case, three valves that must be effectively sealed closed when a tank is readied for sale (two fill lines and the overflow/equalizer line)

1/ The assessment regulation for which appellant was cited, 43 CFR 3163.3(j), provided:

"For failure to maintain effective seals required by the regulations in this part and by applicable orders and notices, or for failure to maintain the integrity of any seal placed upon any property or equipment by the authorized officer, \$250."

This regulation was subsequently suspended by notice printed in the Federal Register (50 FR 11517 (Mar. 22, 1985)).

were found during the February 19 inspection to be incapable of being sealed effectively. Because of a recent cap on assessments for noncompliance, the amount charged is limited to two times the amount for the assessment or \$500 (43 CFR 3163.3(j)).

The follow-up inspection on March 11 found that the overflow/equalizer line had been changed to accommodate a seal. However, as evidenced by the photographs [2/] taken by the inspectors, even with a seal installed, the valve could be opened without destroying the seal. The valve could, therefore, still not be effectively sealed for the sales phase. The enforcement procedures and regulations require that for failure to comply with a written order of the authorized officer in the time frame specified, the assessment for noncompliance under 43 CFR 3163.3(a) must be levied. In addition, a civil penalty must be levied for failure to comply in the time frame but the District Office failed to do so.

After careful consideration of the documented facts in this case, we conclude that the initial assessments for noncompliance were proper as was the assessment for noncompliance for failure to correct in the time frame specified. However, the District did not also levy the civil penalty for failure to comply in the time frame specified. We will direct the Rawlins District to complete the enforcement procedure as required by regulation and procedure.

Appellant, through counsel, contends the BLM inspector's findings do not constitute INC's for which the regulations authorize assessments. Appellant argues that the February 19, 1985, INC was merely advisory; it summarized the regulatory requirement but did not state a violation. Appellant further states the regulations require that the valves in question be sealed only during the sales phase (Supplemental Statement of Reasons at 12). Appellant argues that the March 26, 1985, notice was invalid under 43 CFR 3163.4 due to the corrective action and improper time requirement. Appellant claims the 5-day period allowed for correction is unauthorized, unreasonable, illegal, arbitrary, and capricious. 3/ Appellant asserts alternatively that, even if assessment is authorized, it should be lower. 43 CFR 3163.3(j) set a \$250 assessment "for failure to maintain effective seals," therefore appellant argues it should not be charged \$500 for two violations but \$250 for a single offense regarding "seals." Appellant also argues that because there was no allegation or evidence of loss or damage, additional amounts cannot be charged for loss or

2/ These photographs were not made a part of the case record.

3/ Appellant here argues the INC's were improper and inappropriate rather than ambiguous. In Anadarko Production Co., 91 IBLA 154 (1986), appellant challenged the necessity of the seal for which the INC notice had been issued and argued that the regulation requiring the sealing of all "appropriate" valves was ambiguous. The regulation was found to be ambiguous when applied to the facts set forth in Anadarko, and the Board reversed BLM's determination in that case.

damage here. Appellant raises the factual issue whether or not the valves were in fact properly sealed or properly corrected, but appellant reserves the question, believing the legal issues dispositive.

[1] The BLM decision relied on 43 CFR 3162.7-4(b)(1), which provides the minimum standard:

(1) All appropriate valves on lines entering or leaving oil storage tanks shall be effectively sealed during the production phase and during the sales phase. The piping and connections in a closed system which are tamper proof or tamper resistant are essentially protected from unauthorized or undocumented entry, but the piping and connections in an open system shall be protected. [Emphasis added.]

43 CFR 3162.7-4(b)(1). See Farmers Union Central Exchange, 87 IBLA 332, 92 I.D. 281 (1985).

Although this regulation does not exempt an operator from compliance during the production phase, the "appropriate" valves would differ at each phase. As appellant points out, when oil is being delivered to the storage facilities during the production phase, certain valves must be open. These same valves must then be closed and sealed to isolate the tank during the sales phase. As this Board stated in Lyco Energy Corp., 92 IBLA 81 (1986):

Valve seals are required to control theft of oil and to ensure accountability for production and sales. Thus, while a seal can be removed by an operator for legitimate purposes, once the operation for which the seal has been removed is completed, the seal should be replaced. To allow the valve to remain unsealed is a violation of 43 CFR 3162.7-4(b). [Emphasis added.]

92 IBLA at 83-84. Certainly filling a tank during the production phase would be a "legitimate" reason for having an unsealed valve on the production side of the tank. The valves for which appellant was cited here were fill-line and equalizer valves. The record here does not clearly show which phase of appellant's operations was being carried out at the time the INC's were issued, but, based on the statements by appellant, we conclude the INC's were issued during the production phase.

However, the record does disclose that when the first INC was issued, the cited valves were incapable of being sealed. Appellant does not dispute this statement. This leads to the rebuttable presumption of fact that these valves were not sealed during the preceding sales phase, a violation of 43 CFR 3162.7-4(b)(1). ^{4/} There is nothing in the record to rebut this presumption. Appellant argues that 43 CFR 3162.7-4(b)(1) should be interpreted to call for one violation rather than a violation for each unsealed

^{4/} This presumption could be overcome by a showing that the valves were, in fact, sealed during the preceding sales phase, or that the tank had been recently installed and there had been no sales from that tank.

valve. However, as noted in Farmers Union Central Exchange, *supra*, each failure to seal a valve is a specific instance of noncompliance. It is therefore appropriate for BLM to cite each valve as a separate violation.

We find the second INC, issued on March 11, 1985, should not have been issued. The regulations do not require an operator to seal valves open during the production phase. Certainly, if BLM wanted to require all valves be sealed, whether open or closed, it could have promulgated a regulation so requiring. On the basis of the record, we must find there is an insufficient showing that the equalizer line valve must be sealed during the production phase in order to control theft and to ensure accountability. Therefore, the second INC and resulting assessments are vacated.

[2] BLM levied the assessment for the first INC pursuant to 43 CFR 3163.3(j). Regulation 43 CFR 3163.1 authorizes BLM officers to assess liquidated damages in specific instances of noncompliance. A finding of violation and a levy of assessment are two separate determinations made pursuant to different regulations. Lyco Energy Corp., *supra*.

Appellant objects to assessments as unjustified, unauthorized, and unnecessary in view of the time requirement for corrective action allowed by the penalty provision in 43 CFR 3163.4. However, this penalty provision is not at issue. Rather, as this Board stated in Mont Rouge, 90 IBLA 3, 5 (1985):

An assessment under 43 CFR 3163.3 is not considered to be either a fine or a penalty. Rather, it is in the nature of "liquidated damages" to "cover loss or damage to the lessor from specific instances of noncompliance." 43 CFR 3163.3 [5/] Thus, if a finding of noncompliance is technically and procedurally correct, a minimum assessment is properly levied, regardless of subsequent efforts on the part of lessee to comply by abatement of the noncompliance condition.

The regulation requires that when an assessment is levied, the amount must be not less than \$250. Such an assessment is compensation to the United States. 6/ Costs and expenses are incurred by BLM which would not have been

5/ A failure to perform or commence remedial action pursuant to a notice may subject a lessee to a penalty pursuant to 43 CFR 3163.4-1.

6/ The preamble to this regulatory revision explained:

"Section 3163.3 Assessments for noncompliance:

"Two comments suggested that certain of the assessments provided for in this section of the existing regulations are de facto penalties and should either be removed by the final rulemaking or applied under the procedures prescribed by section 109 of the Federal Oil and Gas Royalty Management Act and § 3163.3 of the existing regulations. The final rulemaking does not adopt either of these suggested changes because such assessments do not constitute penalties. While these assessments may appear to be penalties, they are merely compensation to the United States for damages to resources or existing improvements and the added administrative cost to the United States caused by reason of a lessee's failure to comply with the regulations in this part and the resultant need for regulatory action to obtain a correction of the deficiency." 49 FR 37361 (Sept. 21, 1984).

incurred but for the noncompliance. BLM must issue the notice, and take such steps and conduct such additional physical inspections as are necessary to ensure the noncompliance is abated. Although good faith or timeliness of compliance may be a consideration as to the penalty provisions of 43 CFR 3163.4-1, neither factor is a consideration under 43 CFR 3163.3(j). Lyco Energy Corp., *supra*; Yates Energy Corp., 89 IBLA 150, 153 (1985).

The BLM technical and procedural review decision states "that for failure to comply with a written order of the authorized officer in the time frame specified, the assessment for noncompliance under 43 CFR 3163.3(a) must be levied. In addition, a civil penalty must be levied for failure to comply in the time frame but the District Office failed to do so." 7/ (Emphasis added.)

The regulations are not this restrictive regarding the levy of assessments. Yates Energy Corp., *supra*. The regulation, 43 CFR 3163.1 allows the levy of an assessment as one of a number of courses BLM could take individually or collectively.

In the event of an act of noncompliance, the authorized officer is authorized * * * to shut down operations; * * * to recommend cancellation of the lease * * * and to assess penalties and/or liquidated damages in specific instances of noncompliance when the lessee fails to comply with applicable law, the regulations in this part or promulgated under the cited laws, the lease terms, the approved operating plan, or the written orders or instructions issued by the authorized officer.

By this regulation, the BLM officer is "authorized" to perform these functions, not required to do so. This regulation is sufficiently broad to provide discretionary authority to not levy an assessment. 8/ BLM may properly invoke 43 CFR 3163.3 where it would not be arbitrary, capricious, or an abuse of discretion to do so. Benson-Montin-Greer Drilling Corp., 92 IBLA 92 (1986). At the time the disputed INC's were issued, it was BLM policy to apply the assessments listed in 43 CFR 3163.3 automatically. Lyco Energy Corp., *supra* at 85. See Instruction Memorandum (IM) No. 84-594 (July 12, 1984); IM No. 84-594 Change 3 (Jan. 4, 1985).

Eleven days after issuing the second INC, BLM suspended 43 CFR 3163.3(c) through (j), except where actual loss or damage could be ascertained. 50 FR 11517 (Mar. 22, 1985). On January 30, 1986, BLM published proposed rules eliminating the automatic assessment for the failure to maintain effective seals under 43 CFR 3163.3(j); 51 FR 3882, 3890 (Jan. 30, 1986). Under the proposed rules, a lessee cited for failure to maintain effective seals would be given a specified time to comply. 51 FR 3890 (Jan. 30, 1986) (to be codified at 43 CFR 3163.3(b)(1)). Therefore, under the proposed rules, BLM

7/ Further, in the second INC, BLM stated the violation incurred an "automatic assessment of \$250 under 43 CFR 3163.3(a)." (Emphasis added.)

8/ We note also that regulatory authority to waive assessments is acknowledged at 43 CFR 3163.5(c).

&would not automatically assess Mingo, but would be required to give it notice that it had violated valve sealing requirements.

We recognize 43 CFR 3163.3(j) was in effect at the time BLM imposed the assessment, and neither the suspension nor the proposed regulations are dispositive herein. They do, however, reflect the Department's present policy concerning the levy of an assessment for failure to maintain effective seals. In the past this Board has applied a stated change in policy to a pending matter, if to do so would benefit the affected party, and there are no countervailing laws, regulations, public policy reasons,&or intervening rights. For that reason, we vacate the decision to levy assessment pursuant to 43 CFR 3163.3(j). Lyco Energy Corp., *supra* at 86; Somont Oil Co., 91 IBLA 137 (1986).

&In summary, the Board affirms the issuance of the initial INC as modified herein. However, both assessments and the second INC are hereby vacated.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the New Mexico State Office is affirmed in part as modified and vacated in part.

R. W. Mullen
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

ADMINISTRATIVE JUDGE VOGT DISSENTING:

The majority bases its conclusion that a violation of 43 CFR 3162.7-4(b)(1) occurred upon a "rebuttable presumption" that the valves at issue were not sealed during the sales phase preceding the Bureau of Land Management (BLM) inspection and the fact that nothing in the record rebuts the presumption. The majority states that the presumption could have been overcome by a showing that the valves were in fact sealed during the preceding sales phase or that the tank had been recently installed and there had been no sales from that tank. If the record contained some evidence that sales had been made from the tank during a period of time reasonably close to the BLM inspection, a presumption that the valves were not sealed during that sales phase might be warranted. However, the record does not contain such evidence. In my opinion, it was incumbent upon BLM to show, at the least, that sales from the tank had preceded the inspection. Therefore, I would vacate the incident of noncompliance resulting from the BLM inspection of February 19, 1985.

Anita Vogt
Administrative Judge
Alternative Member

